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Thomas Jefferson's Establishment Clause Federalism

by DAVID E. STEINBERG*

Introduction

Constitutional history can be used or misused. Historical analysis can provide insight into provisions shrouded in opaque language. But constitutional history also can be used to mislead, painting an intentionally distorted picture of people or events.

The standard Supreme Court account of Thomas Jefferson's views on the Establishment Clause is as follows. According to most Court opinions, Jefferson viewed the Establishment Clause as the embodiment of the church-state separation principle. The Establishment Clause would provide a means for the federal government—and the Supreme Court in particular—to implement Jefferson's separationist philosophy. With the incorporation of the Establishment Clause in the mid-20th century, the Supreme Court would mandate that the separation of church and state must apply not only to the federal government, but also to state and local governments.

If Jefferson were alive today and could read the Court's account of his views, he would be horrified. A distrust of centralized, federal authority was the hallmark feature of Jefferson's political philosophy. More than anything else, Jefferson sought to limit the power of the federal government, leaving authority with state and local governments.

The mainstream treatment of Jefferson's views on the Establishment Clause is virtually the polar opposite of Jefferson's

* Professor of Law, Thomas Jefferson School of Law, B.A., Northwestern University; J.D., Stanford Law School. My most sincere thanks to Neil Fox, for his superb research assistance. Of the many sources cited in this article, I want to highlight a superb piece by Seth Kincaid Jolly, titled *Jeffersonian Federalism: State Rights and Federal Power*, available at <http://faculty.maxwell.syr.edu/skjolly/jeffersonianfederalism.pdf>. I received generous research funding from the Thomas Jefferson School of Law.

actual position. Beginning with *Everson v. Board of Education*,¹ a series of Supreme Court decisions have treated Jefferson as an advocate of a top-down, federally compelled rule mandating a separation of church and state. The Court has cited Jefferson as an advocate for Supreme Court intervention in traditionally local decisions such as developing school curriculum, assessing the propriety of religious ceremonies in public schools, and deciding whether to provide government aid to private religious schools. In other words, the Court has cited Jefferson as an advocate for federal regulation of religion—and as an advocate for expanded Supreme Court authority. Such heavy-handed federal authority is the precise opposite of everything Jefferson believed in.

Part I of this article discusses Jefferson's early church-state views, as expressed by Jefferson to the Virginia legislature. Jefferson did advocate an end to the practice of collecting religious assessments, an unusual position at a time when religious assessments still were commonplace. However, Jefferson also authored bills that prohibited work on the Sunday Sabbath, and authorized Thanksgiving holidays. At the University of Virginia, Jefferson approved construction of religious schools on the university campus, and assumed that university students would receive religious instruction. In Virginia, Jefferson's position on church-state relations was complex, ambiguous, and not susceptible to an easy characterization.

Part II traces the development of Jefferson's thoughts on federalism and religion. The principal theme that emerges from Thomas Jefferson's writings is a desire to limit federal power. Jefferson was heavily influenced by the political philosopher Montesquieu, and especially by the anti-federalist movement. Both the anti-federalists and Jefferson concluded that a powerful federal government would lead to tyranny. In particular, the anti-federalists feared that the federal government might impose a single, mandatory state religion, much like contemporary authoritarian governments in Europe. Jefferson's advocacy of limited federal powers crystallized in his unsuccessful opposition to the Bank of the United States.

Part III of this article reviews Jefferson's mature writings on church and state. Time and again, Jefferson advocated federal non-interference in church-state relationships—whatever form those relationships took. For example, Jefferson's *Kentucky Resolutions* asserted that the federal government had "no power over the

1. See generally *Everson v. Board of Education*, 330 U.S. 1 (1947).

freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . All lawful powers respecting the same did of right remain, and were reserved to the states, or to the people.”² Jefferson’s famous metaphorical “wall of separation”³ is properly understood as a wall that prevented federal interference in state regulation of religion, rather than a wall that barred states from aiding religion.

Part IV reviews the modern Supreme Court’s misstatement of Jefferson’s views on the Establishment Clause. Beginning with *Everson*, Supreme Court opinions frequently have noted Jefferson’s purported belief in a “wall of separation between Church and State.”⁴ The Court has invoked Jefferson as authority for intervening in state regulation of religion, in order to prevent a breach of Jefferson’s mythical wall. In other words, the Court has cited Jefferson to support federal policing of church-state relationships, when Jefferson actually sought to place such relationships beyond the jurisdiction of the federal government.

This article does not evaluate the normative proposition that the Establishment Clause *should* require a federally mandate separation of church and state. Jefferson and the other framers did not endorse such a view, but times have changed considerably since 1791. Some contemporary policymakers and scholars believe that a federally mandated separation of church and state is sound government policy. But there is no justification for citing Jefferson in support of such a federal church-state separation policy. To ascribe such views to Jefferson is to be shockingly ignorant at best and intentionally deceptive at worst.

I. Jefferson’s Early Church-State Views: Jefferson in Virginia

Those who describe Jefferson as a separationist rely heavily on his Virginia Bill for Establishing Religious Freedom. Without question, this bill was an important piece of legislation during the framing era, which illustrated the changing nature of church-state

2. Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799* (Nov. 10, 1798), reprinted in 5 THE FOUNDERS’ CONSTITUTION 131, 132 (Philip B. Kurland & Ralph Lerner eds., The University of Chicago Press 1987) (1798) (hereinafter *Kentucky Resolutions*).

3. Thomas Jefferson, *Letter to a Committee of the Danbury Baptist Association* (Jan. 1, 1802) in 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (Albert Ellery Berg, ed., 1904).

4. *Everson*, 330 U.S. at 16.

relationships in early America. But to simply describe Jefferson's work in Virginia as church-state separation inaccurately simplifies a more complex picture.

As eventually adopted by the Virginia legislature, Jefferson's Bill for Establishing Religious Freedom ended the Virginia practice of religious assessments—taxes collected by the state and turned over to churches. In colonial America, religious assessments had been the norm. Jefferson's bill was an important part of the trend away from religious assessments, with such assessments abolished in every state by the 1830s. Nonetheless, the Bill for Religious Freedom does not establish Jefferson as endorsing a separationist view of church-state relationships, despite claims of modern separationists to the contrary.

Separationists often look to the Bill for Establishing Religious Freedom itself, rather than the context of Jefferson's other acts and statements with respect to church-state relations. In its first decision on the Establishment Clause, *Everson v. Board of Education*,⁵ the Supreme Court discussed the original understanding of the Establishment Clause by focusing exclusively on the Virginia debate about religious assessments, rather than by focusing on discussions of the Establishment Clause itself. This myopic focus led the *Everson* Court to conclude: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"⁶

Even viewed in isolation, the Bill for Establishing Religious Freedom does not support the argument that Jefferson was a strict separationist. As Professor Daniel L. Dreisbach has observed, Jefferson advocated his bill for establishing religious freedom based on an explicitly religious justification. "The existence of 'Almighty God' who 'hath created the mind free' and willed that 'free it shall remain,' Jefferson argued, provided the rationale for governmental recognition of religious freedom."⁷ This religious justification offered by Jefferson is inconsistent with a strict separation of church and state.

More importantly, as Professor Dreisbach observes, Jefferson's Bill for Establishing Religious Freedom was one of five bills

5. *Everson*, 330 U.S. at 11–12.

6. *Id.* at 16.

7. Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 187–88 (1990) (citing 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., Princeton University Press 1950) (hereinafter THE PAPERS OF THOMAS JEFFERSON)).

introduced by James Madison to the Virginia General Assembly in 1785.⁸ All of these bills dealt with different aspects of church-state relations. Like Bill No. 82, “A Bill for Establishing Religious Freedom,” most or all of these bills were authored by Jefferson. Both the Supreme Court and modern separationist scholars have focused exclusively on Bill No. 82, while ignoring the other four bills. However, at least two of these five bills call into question whether Jefferson actually embraced separationist beliefs in 1785.

In addition to Bill No. 82, James Madison also introduced Bill No. 84, “A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers” in 1785.⁹ Like Bill No. 82, Bill No. 84 was probably also written by Jefferson.¹⁰

Bill No. 84 provided that clergymen could not be arrested while performing religious services. More significantly, the bill imposed severe penalties—including imprisonment—on anyone who disturbed religious services.¹¹ The bill also made it a crime for anyone to work on Sunday, or employ others to work on Sunday.¹² Professor Dreisbach writes: “The religious intent of the bill is undeniable, made obvious by the use of the word ‘Sabbath’ as compared to a religiously neutral term like ‘Sunday.’”¹³

In 1785, Bill No. 85, like the Bill for Establishing Religious Freedom, was introduced to the Virginia General Assembly. Bill No. 85 was titled: “A Bill for Appointing Days of Public Fasting and Thanksgiving.”¹⁴ Like the Bill for Establishing Religious Freedom, Bill No. 85 also was authored by Jefferson, and introduced by Madison before the Virginia General Assembly.¹⁵

Under Bill No. 85, the Governor or Chief Magistrate of Virginia could designate days of Thanksgiving and fasting, and could notify the public of these days by a proclamation.¹⁶ The Virginia General Assembly never enacted Bill No. 85. But for the purpose of understanding Jefferson’s views on church-state relations, the

8. *Id.* at 184–200.

9. Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI 59 (Richmond 1784). (hereinafter Report of the Committee).

10. *See* Dreisbach, *supra* note 7 at 190 (“This legislation, the evidence suggests, also was drafted by Jefferson.”).

11. *Id.*

12. *Id.*

13. Dreisbach, *supra* note 7 at 191.

14. Report of the Committee, *supra* note 9 at 59–60.

15. Dreisbach, *supra* note 7 at 193.

16. Report of the Committee, *supra* note 9 at 59–60.

legislature's failure to enact Bill No. 85 seems largely irrelevant.¹⁷ Bill No. 84 and Bill No. 85 both provide government support to religion. Both bills are inconsistent with the view of Jefferson as a strict separationist.

Years later, Jefferson's act in founding the University of Virginia—the state's first public college—demonstrated a similar ambiguity about Jefferson's views on church and state. Defying conventional wisdom, Jefferson intentionally chose not to construct a church at the center of the university. Instead, when the university opened in 1824, at the center of the university was the rotunda, which housed a library. This fact would seem to support the view that Jefferson believed in separation of church and state.

However, while the University of Virginia did not include a church, Jefferson apparently did expect religion to be an important part of life at the university. For example, as David Barton notes, Jefferson included space within the university rotunda for chapel services.¹⁸ Dissenting in *McCullum v. Board of Education*, Justice Reed further observed that Jefferson anticipated that University of Virginia students would attend religious services at nearby schools.¹⁹ Justice Reed quoted Jefferson's statement:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.²⁰

To summarize, Jefferson's approach to church-state relations in Virginia was ambiguous. Some of Jefferson's church-state views were

17. Dreisbach, *supra* note 7 at 193.

18. Minutes of the Board of Visitors of the University of Virginia, during the Rectorship of Thomas Jefferson (May 5, 1817), in 19 THE WRITINGS OF THOMAS JEFFERSON 449–50 (Andrew A. Lipscomb ed., 1905) (1817). See also David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 409 (2003).

19. State *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 246 (1948) (Reed, J., dissenting); See also Barton, *supra* note 18 at 409–10.

20. *McCullum*, 333 U.S. at 246 (quoting THE WRITINGS OF THOMAS JEFFERSON, *supra* note 18, at 449) (emphasis added).

unusual for his time because he advocated an end to religious assessments when many states continued to collect such assessments. Jefferson's decision not to place a church at the center of the University of Virginia also was highly unusual.

However, Jefferson cannot be accurately described as a separationist according to the actions he took while in Virginia. Although Jefferson did write a bill that ended religious assessments, Jefferson wrote other bills prohibiting work on the Sabbath, and authorizing dates of Thanksgiving. At the University of Virginia, Jefferson approved construction of schools of religious instruction on the university campus, and assumed that university students would receive religious instruction.

Those who characterize Jefferson as a separationist, including the Supreme Court Justices in *Everson v. Board of Education*,²¹ tend to focus on Jefferson's actions in Virginia. However, Jefferson's approach to church-state relations in Virginia was not susceptible to easy simplification. In Virginia, Jefferson was not a consistent separationist, within the modern understanding of this word.

II. Federalism and Religion: The Development of Jefferson's Federalist Views

A. The Intellectual Origins of Jefferson's Federalism

As will be discussed in a subsequent section,²² Jefferson's reading of the First Amendment religion guarantees was based on the concept of federalism. For Jefferson, the religious clauses of the First Amendment deprived the federal government of all authority over religious regulation. In other words, the First Amendment left religious regulation to the states. To understand why Jefferson supported federal noninterference in church-state matters, one must understand the origins of Jefferson's federalist thought.

For the American framers—and especially for Jefferson and his allies—one of the most important political philosophers was Charles-Louis de Secondat, baron de La Brede et de Montesquieu—typically referred to as Montesquieu. To take just one example of Montesquieu's influence on the new republic, it was Montesquieu who suggested that to preserve freedom, government powers must be separated into three branches—the executive, the legislative, and the

21. See generally, *Everson*, 330 U.S. 1.

22. See text accompanying notes 84–85.

judiciary. Consider the following passage by Montesquieu: "If the judiciary power is not separated from the legislative and executive power, freedom no longer exists. If the judiciary and legislative powers are joint, then there will dictatorial power against the life and freedom of the citizens. That is because the judge will also be the legislator."²³ James Madison thus borrowed from Montesquieu when Madison wrote in *Federalist* No. 47, "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."²⁴

In writing about republican government, Montesquieu postulated that a large republic could not survive. In reaching this conclusion, Montesquieu was thinking principally of two extinct republics—the Roman Republic, which became the Roman Empire, and the Commonwealth of England, which ended with the dictatorship of Oliver Cromwell.

Montesquieu suggested that a large republic would contain so many different interests and interest groups it would be impossible to discern the common good.²⁵ Unable to legislate for the common good, government officials would act based on self-interest or ambition. A second, related problem Montesquieu described was the distance in a large republic between the citizen and the government. As a result, citizens tended to feel allegiance not to the distant state, but rather to particular leaders. Over time, these leaders would seize power, and the republic would dissolve into a tyrannical dictatorship.

Consider Montesquieu's discussion of the end of the Roman Republic:

When the domination of Rome was limited to Italy, the republic could easily maintain itself. A soldier was equally a citizen . . .

But when the legions crossed the Alps and the sea, the warriors, who had to be left in the countries they were subjugating for the duration of several

23. Charles de Secondat, *Baron de Montesquieu*, 1 *THE SPIRIT OF LAWS* 152–156 (Thomas Nugent trans., P.F. Collier & Son 1900).

24. *The Federalist* No. 47 at 269 (James Madison) (Clinton Rossiter ed., 1999).

25. See MELVIN RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 233 (Cambridge University Press 1977) ("In a large republic, the common good is [subject] to any number of considerations; it is [subordinated] to exceptions; it . . . depend[s] [on] accidents. In a small republic, the public good is more [strongly] felt, better known [and] closer to each citizen; abuses are . . . less [extensive,], and consequently, are less [protected].").

campaigns, gradually lost their citizen spirit. And the generals, who disposed of armies and kingdoms, sensed their own strength and could obey no longer.

The soldiers then began to recognize no one but their general, to base all their hopes on him, and to feel more remote from the city. They were no longer the soldiers of the republic but those of Sulla, Marius, Pompey, and Caesar. Rome could no longer know if the man at the head of an army in a province was its general or its enemy.²⁶

Montesquieu thus seems to have arrived at a paradox. He writes: "If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection."²⁷ One way out is for several small republics to form a confederation for the purpose of defense. For Montesquieu, the Swiss cantons were an important example of such a confederate republic: "A republic of this kind, able to withstand an external force, may support itself without any internal corruption; the form of this society prevents all manner of inconveniences."²⁸

It is no coincidence that the original charter for a central American government was titled the "Articles of Confederation" after Montesquieu's description of an alliance of small republics. As Douglas Smith observes: "Montesquieu's political writings most evidently influenced the Framers of the Constitution."²⁹ Smith also observes: "Both Federalists and Antifederalists often referred to the union among the states under the Articles of Confederation and the Constitution as a confederate republic."³⁰

Montesquieu's writings would have a profound influence on Jefferson, Madison, and their anti-federalist allies.³¹ The most critical

26. MONTESQUIEU, CONSIDERATIONS ON THE CAUSES OF THE GREATNESS OF THE ROMANS AND THEIR DECLINE 91 (David Lowenthal trans., Hackett Publishing Co., Inc. 1999) (1734).

27. MONTESQUIEU, THE SPIRIT OF THE LAWS 131 (Anne M. Cohler et al., eds. trans., Cambridge University Press 1989) (1748).

28. *Id.* at 132.

29. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 260 (1997).

30. *Id.*

31. See generally Joyce Oldham Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson*, 39 WM. & MARY Q. 287, 290-94 (1982) (describing how Jefferson and Madison were influenced by Montesquieu).

point that these early Americans took from Montesquieu was that while a republic could thrive in a small nation, an attempt to create a large republic would lead to despotism. Matthew P. Bergman observes: "Central to the Antifederalists' opposition to the centralization of power in the proposed Constitution was the idea that republican governments only thrive in small territories with a small, homogeneous population."³² In fact, an opposition to centralizing authority in the federal government became a theme that dominated Thomas Jefferson's political thought.

B. Jefferson's View on State and Federal Authority

Jefferson repeatedly demonstrated a distrust of the federal government, and a preference for lawmaking by the states. Jefferson ultimately endorsed a sharp dichotomy, where the federal government would have authority to conduct foreign affairs, while states would have unfettered authority with respect to domestic lawmaking. Jefferson's endorsement of sharp limits on federal power allied him with the anti-federalists, who ultimately would succeed in electing Jefferson as president.

Consistent with Montesquieu, Jefferson's writings repeatedly emphasize the danger posed by a strong federal government. In 1791 letter to Archibald Stuart, Jefferson wrote:

[I]t is easy to foresee from the nature of things that the incroachments of the state governments will tend to an excess of liberty which will correct itself . . . while those of the general government will tend to monarchy, which will fortify itself from day to day, instead of working it's own cure, as all experience shews Then it is important to strengthen the state governments: and as this cannot be done by any change in the federal constitution . . . it must be done by the states themselves, erecting such barriers at the constitutional line as cannot be surmounted either by themselves or by the general government.³³

32. Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 27 (1990).

33. Thomas Jefferson, *Letter to Archibald Stuart* (Dec. 23, 1791), reprinted in 12 THE PAPERS OF THOMAS JEFFERSON 436 (Julian P. Boyd et al., eds. Princeton University Press 1950) (1791).

In a 1797 letter to James Monroe, Jefferson made a similar point: "The system of the General government, is to seize all doubtful ground . . . It is of immense consequence that the States retain as complete authority as possible over their own citizens."³⁴

Fearing federal tyranny, Jefferson eventually endorsed a relationship identical to that described by Montesquieu. Jefferson argued that the federal government had authority to deal with foreign affairs and national security, leaving domestic lawmaking and policy to the state governments. Jefferson expressed this distinction in his first inaugural address, in which he urged "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."³⁵ In an 1811 letter, Jefferson again argued that the federal government should be limited to foreign affairs because strong state governments would provide a defense against federal tyranny. Jefferson wrote:

Seventeen distinct States, amalgamated into one as to their foreign concerns, but single and independent as to their internal administration, regularly organized with legislature and governor resting on the choice of the people, and enlightened by a free press, can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation³⁶

An 1823 letter to William Johnson contains one of the most concise statements of Jefferson's foreign affairs/domestic affairs distinction. Jefferson wrote: "I believe the States can best govern our home concerns, and the General Government our foreign ones."³⁷

34. Thomas Jefferson, *Letter to James Monroe* (Sept. 7, 1797), reprinted in 7 THE WRITINGS OF THOMAS JEFFERSON 173 (Paul L. Ford ed., G. P. Putnam's Sons 1897) (1797).

35. Thomas Jefferson, *First Inaugural Address*, reprinted in THOMAS JEFFERSON WRITINGS 494 (Merrill D. Peterson ed., Press Syndicate of the University of Cambridge 1984) (1801).

36. Thomas Jefferson, *Letter to A.C.V.C. Destutt de Tracy* (Jan. 26, 1811), reprinted in 9 THE WRITINGS OF THOMAS JEFFERSON 308-09 (Paul L. Ford ed., G.P. Putnam's Sons 1897) (1811).

37. Thomas Jefferson, *Letter to William Johnson* (June 12, 1813), reprinted in 10 THE WRITINGS OF THOMAS JEFFERSON 232 (Paul L. Ford ed., G.P. Putnam's Sons 1897) (1813).

The next section explores the connection between Jefferson and the anti-federalists. Given this connection, it is not surprising to find that the anti-federalists also argued that federal power should be limited to foreign affairs. For example, in January 1788, anti-federalist Brutus acknowledged: "It is true this system commits to the general government the protection and defence of the community against foreign force and invasion, against piracies and felonies on the high seas, and against insurrections among ourselves."³⁸ But Brutus also viewed federal power as largely limited to such cases involving foreign affairs. Brutus concluded: "The state governments are entrusted with the care of administering justice among its citizens, and the management of other internal concerns, they ought therefore to retain power adequate to the end."³⁹

The preceding two sections have sketched the origins of Jefferson's federalist views in the writings of Montesquieu, and Jefferson's own suspicions that broad federal power could lead to tyranny and despotism. Given Jefferson's intense desire to limit federal power, it seems strange that the Supreme Court has cited Jefferson as an advocate for federal regulation of church-state relationships. As the next section demonstrates, Jefferson's allies in the anti-federalist movement deeply feared federal authority over religious regulation.

C. The Anti-Federalist Movement

1) *The Anti-Federalist Arguments for Limiting Federal Power*

The anti-federalists were a diverse, loosely organized movement who opposed ratification of the Constitution. The anti-federalists believed that governing powers should rest with the states.⁴⁰ They feared that the federal government would become an all powerful sovereign, where a few members of the ruling elite exercised tyrannical powers—comparable to the contemporary European aristocracies. For example, the anti-federalist "Brutus" wrote in a discussion about the federal government, "the great officers of government would soon become above the controul [sic] of the people, and abuse their power to the purpose of aggrandizing

38. Brutus, *Essays of Brutus (VII)*, in 2 THE COMPLETE ANTI-FEDERALIST 400–01 (Herbert J. Storing ed., University of Chicago Press 1981) (1788).

39. *Id.*

40. See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 7, 9–10 (Murray Dry ed., University of Chicago Press 1981).

themselves, and oppressing them.”⁴¹ Some of the leading anti-federalists included Patrick Henry, George Mason, Edmund Randolph, James Winthrop, and Richard Henry Lee.⁴²

The anti-federalists ultimately lost their argument opposing ratification of the Constitution. But at the time, their influence was considerable, as indicated by the many votes against ratification of the Constitution. For example, Virginia ratified the Constitution by a vote of 89-79. In New York, the vote was 30-27. In New Hampshire, the Constitution was ratified by a vote of 57-47.⁴³ Rhode Island and North Carolina refused to ratify the Constitution.⁴⁴

Of early America's most influential statesmen, Jefferson was most closely connected with the anti-federalist movement, though Jefferson never formally identified himself as an anti-federalist. In fact, Jefferson served as the Secretary of State in President Washington's federalist government.

When Jefferson ran for President in 1796 (unsuccessfully), and in 1800 and 1804 (successfully), his party was named the Democratic-Republicans. However, scholars have noted that Jefferson's Party “was sometimes referred to as the Anti-Federalist Party.”⁴⁵ In fact, many of the committed anti-federalists ultimately became members of Jefferson's Democratic-Republican Party. And Jefferson identified with the anti-federalist desire for a strictly limited federal government.

One of the most consistent anti-federalists critiques of the original draft of the Constitution was that the document lacked a bill of rights, which limited federal power.⁴⁶ When the Constitution was

41. Brutus, *If You Adopt It . . . Posterity Will Execrate Your Memory*, N.Y. J. (Oct. 18, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION 174 (Bernard Bailyn ed., Library of America 1993) (1787).

42. See generally JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 (Quadrangle 1961).

43. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RIGHTS J. 73, 83 n.52 (2005). See also 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION xli - xlii (Merrill Jensen et al., eds., Wisconsin Historical Society Press 1976).

44. *Wallace v. Jaffree*, 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting).

45. John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1210 (1997). See also SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 13 (The University of North Carolina Press 1999) (discussing changes in anti-federalist thought, with many former anti-federalists joining the Democratic-Republican Party).

46. 46. See, e.g., ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 120-25 (University of North Carolina Press 1955).

drafted, Jefferson was serving as the United States ambassador to France. Writing to James Madison in a letter dated December 20, 1787, Jefferson took up the anti-federalist advocacy of a bill of rights.

In describing what he did not like about the newly drafted United States Constitution, Jefferson wrote: "I will now add what I do not like. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies"⁴⁷ Jefferson continued: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inferences."⁴⁸

Both Jefferson and the anti-federalists worried that a federal government of unlimited powers could result in tyranny. Like the anti-federalists, Jefferson sought a bill of rights as a means of limiting federal power. The next section reviews anti-federalist thought on how a bill of rights could protect religious exercise.

2) *The Anti-Federalist Fear of Federal Religious Regulation*

The need to prohibit federal interference in state religious regulation—and particularly the need to prevent federal institution of a national religion—was perhaps the most common theme in anti-federalist opposition to the Constitution.⁴⁹ Anti-federalist critiques of the original unamended Constitution often began by noting that the document did not mention religion at all. Based on this omission, the anti-federalists argued that because the Constitution did not mention religion, the federal Congress would have unfettered power to regulate religion.

Of the possible federal regulations, the anti-federalists most feared Congress' imposition of a uniform national church, and the accompanying abolition of the differing church-state relationships in various states. Professor Vincent Munoz has written: "The primary criticism the Anti-Federalists leveled was that the proposed Congress, through its power to make all laws necessary and proper, could

47. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 660 (Julian P. Boyd ed., Princeton University Press 1958) (1789).

48. *Id.*

49. See, e.g., Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1084 (1998) (asserting that "the most common objection in regard to congressional power and the subject of religion was that Congress might attempt to regulate that subject as one of its express or implied responsibilities").

impose uniformity of religious practice through the establishment of a national religion.”⁵⁰ These anti-federalist fears were recognized in James Madison’s first draft of what initially became the religions clauses of the First Amendment, which provided: “The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretense infringed.”⁵¹

The concerns raised by an anti-federalist writing under the pen name “An Old Whig” were typical:

[I]f a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.⁵²

“Deliberator,” a Pennsylvania anti-federalist, also expressed concerns about Congress establishing a national religion. Deliberator wrote Congress may, if they shall think it for the “general welfare,” establish an uniformity in religion throughout the United States. Such establishments have been thought necessary, and have accordingly taken place in almost all the other countries in the world, and will, no doubt, be thought equally necessary in this.⁵³ Similarly, at the New York ratifying convention, antifederalist Thomas Tredwell wished “that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment.”⁵⁴

50. Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CON. L. 585, 612, 615 (2006).

51. 1 ANNALS OF CONGRESS OF THE UNITED STATES 434 (Joseph Gales ed., 1834) (emphasis added).

52. See Essays of An Old Whig, Philadelphia Indep. Gazetter, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 37 (Herbert J. Storing ed., University of Chicago Press 1981) (Oct. 1787, Feb. 1788).

53. Essay by Deliberator, Freeman’s J. (Philadelphia), Feb. 20, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 176, 179 (Herbert J. Storing ed., 1981), (University of Chicago Press) (1788).

54. See, e.g., 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (J. B. Lippincott 2d ed., 1836).

Fears that Congress would establish a single national church and demand religion uniformity among the states were particularly prevalent in New England. In the late 18th century, many other states—including Virginia—were moving away from state support for a particular religion. But this was not the case in the New England states, which continued to support the Congregational Church as the official state religion.

Massachusetts anti-federalist “Agrippa” wrote of these worries about a federally enforced religious orthodoxy:

Attention to religion and good morals is a distinguishing trait in our [Massachusetts] character. It is plain, therefore, that we require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us. Unhappiness would be the uniform product of such laws; for no state can be happy, when the laws contradict the general habits of the people, nor can any state retain its freedom, while there is a power to make and enforce such laws. We may go further, and say, that it is impossible for any single legislature so fully to comprehend the circumstances of the different parts of a very extensive dominion, as to make laws adapted to those circumstances.⁵⁵

As noted above, Jefferson argued throughout his life that the federal government should be limited to foreign affairs, with state governments retaining authority over domestic matters. When it came to subject of religious regulation, the anti-federalists shared Jefferson’s fear of federal intervention and tyranny. While the Supreme Court has cited Jefferson as authority for federal intervention in church-state relationships, this type of federal control was precisely what Jefferson’s anti-federalist colleagues feared.

D. Jefferson and the Bank of the United States

In 1790, Treasury Secretary Alexander Hamilton advocated that the federal government establish a Bank of the United States. The bank would print money and establish credit. Hamilton’s proposal

55. Letters of Agrippa (XII), *Mass. Gazette*, Jan. 11, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 93, 94 (Herbert J. Storing ed., University of Chicago Press 1981) (1788).

raised an immediate question—did the federal government have the power to create a Bank of the United States? The Constitution did not explicitly describe the bank as one of the powers delegated to the federal government.⁵⁶ Hamilton argued that because the bank “was not precluded by restrictions & exceptions specified in the constitution,” the federal government retained the authority to establish a bank.⁵⁷

Jefferson pointedly disagreed with Hamilton. In a strong endorsement of state’s rights, Jefferson rejected arguments that the power to establish a bank could be implied from the power “to regulate interstate commerce,” or the power “to lay taxes for the general welfare of the United States,” or the authority of the United States “to make laws necessary and proper for carrying into execution enumerated powers.”⁵⁸ In each case, Jefferson asserted that if the implied power of establishing a national bank could be inferred from the express powers Congress ultimately would possess unlimited power.⁵⁹

In a relatively extended passage, Jefferson concluded that the authority to create a Bank of the United States could not be implied from the power to regulate commerce.⁶⁰ Jefferson began by asserting that erecting a bank and regulating commerce were “very different acts.”⁶¹ Jefferson continued: “He who erects a bank creates a subject of commerce in it’s [sic] bills: so does he who makes a bushel of wheat, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby.”⁶²

Jefferson then distinguished between “internal commerce” within a state, and “external commerce.”⁶³ In Jefferson’s view, the Commerce Clause authorized the federal government to regulate or prohibit “external commerce only,” meaning a state’s “commerce with another State, or with foreign nations or with the Indian

56. See U.S. CONST. art I, § 8.

57. Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), reprinted in 3 THE FOUNDERS’ CONSTITUTION 247, 248–49 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987) (1791).

58. See U.S. CONST. art I, § 8.

59. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 3 THE FOUNDERS’ CONSTITUTION 245–47 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987) (1791).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

tribes.”⁶⁴ State duties and tariffs on imports were an example of what Jefferson describes as “external commerce.”⁶⁵

Jefferson distinguished this “external commerce” from “the internal regulation of the commerce of a state, (that is to say of the commerce between citizen and citizen),” which only a state could regulate “exclusively with its own legislature.”⁶⁶ In Jefferson’s view, the Bank of the United States would extend federal power “as much to the internal commerce of every state, as to it’s [sic] external.”⁶⁷ Any such extension of federal power under the Commerce Clause “would be void.”⁶⁸ This argument was an example of the general view held by Jefferson, that the federal government had authority to oversee foreign relations, but not domestic affairs.⁶⁹

Jefferson appeared to view other arguments that the federal government had the authority to establish a Bank of the United States as considerably weaker than the Commerce Clause arguments, writing: “Still less are these powers covered by any other of the special enumerations.”⁷⁰ Jefferson dealt quickly with the argument that the authority to establish a Bank of the United States was supported by another provision in Article I, which gave Congress the power “[t]o lay and collect Taxes” in order to “provide for the common Defence and general Welfare of the United States.”⁷¹ According to Jefferson, this section did not give federal lawmakers the power “to do anything they please to provide for the general welfare, but only to lay taxes for that purpose.”⁷² According to Jefferson, any broader reading of the power to lay and collect taxes “would render all preceding and subsequent enumerations of power completely useless.”⁷³ Such a broad reading of the power to tax “would reduce the whole instrument to a single phrase, that of

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *supra* text accompanying notes 35-37.

70. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15 1791), in 3 THE FOUNDERS’ CONSTITUTION 245-47 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

71. *Id.*; U.S. CONST. art. I, § 8.

72. *Id.*; Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15 1791), in 3 THE FOUNDERS’ CONSTITUTION 245-47 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

73. *Id.*

instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.”⁷⁴

Jefferson also asserted that the Bank of the United States was not authorized by Congress’ power “to borrow Money.”⁷⁵ Jefferson wrote that establishing a bank of the United States “neither borrows money, nor ensures the borrowing of it.”⁷⁶ Jefferson continued: “The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public.”⁷⁷

Finally, Jefferson considered whether the bank was authorized by the constitutional provision granting Congress the authority “to make all laws *necessary* and proper for carrying into execution the enumerated powers.”⁷⁸ While acknowledging that a Bank of United States might make it more *convenient* to collect taxes, Jefferson contended that “*convenient*” was not the same thing as “*necessary*.” Jefferson believed that the Constitution’s framers had made a very deliberate choice of the word “*necessary*.” For Jefferson, “*necessary*” did not equate to “*convenient*” because “[i]f such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one.” As a result, “[i]t would swallow up all the delegated powers, and reduce the whole to one phrase as before observed.”⁷⁹

After pondering the matter, President Washington ultimately signed the legislation establishing the Bank of the United States.⁸⁰ Thus, Jefferson was unsuccessful in arguing that the bank would exceed the scope of federal power. Nonetheless, Jefferson’s opposition to the bank provided him with the opportunity to elaborate one of his most detailed arguments for limited federal power. This view of limited federal power is something quite

74. *Id.*

75. *Id.*; U.S. CONST. art. I, § 8.

76. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15 1791), in 3 THE FOUNDERS’ CONSTITUTION 245–47 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

77. *Id.*

78. *Id.*; U.S. CONST. art. I, § 8.

79. *Id.*; Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15 1791), in 3 THE FOUNDERS’ CONSTITUTION 245–47 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

80. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 232–33 (1993).

different from those views attributed to Jefferson in modern Establishment Clause opinions.

E. Summary

The principal theme that emerges from Thomas Jefferson's writings is a desire to limit federal power. Jefferson feared that a strong federal government would lead to tyranny. In an effort to prevent such despotism, Jefferson sought to confine the federal government to foreign affairs, while maintaining robust state lawmaking with respect to domestic matters.

As discussed in the preceding section, the anti-federalists shared Jefferson's concerns about federal tyranny. In particular, the anti-federalists worried that a strong federal government would establish a single national church and demand religion uniformity.

III. Jefferson's Federalist Views Of Church-State Relations

For Jefferson, the best protection against federal tyranny was to limit the powers of the federal government, and to leave considerable authority in the hands of strong state governments. In support of such states' rights, Jefferson often cited the Tenth Amendment to the United States Constitution.⁸¹ Professor Christopher Parosa has observed:

In Jefferson's mind, an energetic federal government would violate the original intentions of the Revolution; thus, Jefferson aimed to limit federal expansion to only those powers specifically created to remedy the perceived deficiencies of the Articles of Confederation. Accordingly, the focal point of Jefferson's constitutional interpretation became the Tenth Amendment's apparent articulation of the enumerated powers doctrine, as incorporated into the Constitution through the adoption of the Bill of Rights.⁸²

81. U.S. CONST. amend. X.

82. Christopher J. Parosa, *Federalism: Finding Meaning Through Historical Analysis*, 82 OR. L. REV. 119, 134 (2003).

A. The Link Between The First Amendment and the Tenth Amendment

The Tenth Amendment provides, “powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.”⁸³ Until recently, scholars found little connection between the Establishment Clause and the Tenth Amendment. The Tenth Amendment reserved some rights to the states, but certainly not those explicitly stated in the First Amendment—such as the protection of Free Exercise of Religion and against Establishment of Religion.

However, scholars including Professor Daniel Dreisbach and Professor Kurt Lash have asserted that the rights stated in the First Amendment were precisely the rights that the founders intended to reserve to the states.⁸⁴ Take the statement in the First Amendment: “Congress shall make no law respecting an establishment of religion.”⁸⁵ The conventional reading of that statement is that laws “respecting an establishment of religion” are forbidden. However, the more accurate reading is that *Congress* cannot establish a religion. Whether or not to establish a religion is a matter to be decided by each individual state. The First Amendment expresses no opinion on religious establishments—except that Congress lacks the authority to enact such an establishment.

Outraged by the federal Alien and Sedition Acts, Jefferson drafted the Kentucky Resolutions in 1798. Jefferson’s draft clearly states his view of the Establishment Clause as a federalist provision. The Alien and Sedition Acts were flawed because they regulated speech—a power the Constitution had reserved to the states. But beyond the acts themselves, Jefferson penned in this draft a remarkably clear statement of Establishment Clause federalism. Jefferson wrote that the federal government had: “no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . all lawful

83. U.S. CONST. amend. X.

84. See generally DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 69–70 (2002); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1084 (1998).

85. U.S. CONST. amend. I.

powers respecting the same did of right remain, and were reserved to the states, or to the people.”⁸⁶

In a January 23, 1808 letter to Reverend Samuel Miller, Jefferson again stated this federalism theme clearly. Jefferson wrote:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion [First Amendment], but from that also which reserves to the States the powers not delegated to the United States [Tenth Amendment] . . . It must then rest with the States, as far as it can be in any human authority.⁸⁷

Like Jefferson’s draft of the Kentucky Resolutions, this passage treats the First Amendment as a jurisdictional provision that prevents the *federal government* from “intermeddling with religious institutions.” Any such power to legislate with respect to religion must “rest with the states.”

In an 1801 letter to the Rhode Island General Assembly, Jefferson repeated his endorsement of giving states exclusive jurisdiction over religious regulation. Jefferson wrote that the Constitution authorized the “general [federal] government” to legislate with respect to foreign affairs, while giving the states authority over “the care of our persons, our property, our reputation, and religious freedom.”⁸⁸

In 1805, Jefferson again stated this federalism theme in his second inaugural address. In the address, Jefferson asserted:

In matters of religion, I have considered that its free exercise is placed by the constitution independent of

86. Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799* [hereinafter *Kentucky Resolutions*], reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 131, 132 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

87. Thomas Jefferson, *Letter to the Reverend Samuel Miller* (Jan. 23 1808), in 11 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 18, at 428–30. (Albert Ellery Berg ed., 1905).

88. Thomas Jefferson, *Letter to the General Assembly of Rhode Island and Providence Plantations*, (May 26 1801), reprinted in 10 *THE WRITINGS OF THOMAS JEFFERSON* 263 (1903).

the powers of the general [i.e., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.⁸⁹

Once again, this passage provides a clear statement of Jefferson's federalist interpretation of religious regulation. Religious exercise was "independent of the powers of the federal government," and could be regulated only by "State or Church authorities."

Time and again, Jefferson asserted that the federal government lacked any authority to interfere with state religious regulation. As noted in the next section, James Madison expressed the same view.

B. James Madison's Federalist Views

Among framing-era statesmen, James Madison was probably Jefferson's closest collaborator and colleague. Both men were from Virginia. The two men had worked together to repeal religious assessments in Virginia. Jefferson and Madison were amongst the founders of the Democratic-Republican party. Madison served as Jefferson's Secretary of State. With Jefferson's endorsement, Madison was elected President after Jefferson completed two terms in office. The writings of Madison and Jefferson on church and state show considerable similarity. Both men agreed that the federal government lacked any authority to interfere with religious regulation.

Even prior to the adoption of the First Amendment, Madison believed that the Constitution did not provide the federal government with any jurisdiction over religious regulation. At the Virginia Constitutional Convention, the delegates expressed worries that the new federal government could interfere with state religious regulation. Madison responded: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."⁹⁰

89. Thomas Jefferson, *Second Inaugural Address* (Mar. 4 1805), in 3 THE WRITINGS OF THOMAS JEFFERSON 320, 323 (Andrew A. Lipscomb ed., 1905).

90. James Madison, *Remarks Before the Virginia Ratifying Convention* (June 12 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION 88 (P. Kurland & R. Lerner eds. 1987).

Like Jefferson, Madison endorsed a federalist interpretation of the Establishment Clause. Madison expressed this view during the drafting of the Establishment Clause by Congress. Madison's initial draft of the constitutional provision on religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretense infringed."⁹¹ The type of religious establishment prohibited by this section involves a "national religion," presumably established by the federal government. In his opposition to the establishment of a national religion, Madison raised the same concerns expressed by Jefferson and the anti-federalists.

In an exchange during the framers' discussion of the First Amendment, Madison reiterated his federalist understanding of the Establishment Clause. During the discussion of the Establishment Clause in the House of Representatives, Madison was questioned about whether this provision might prohibit state establishments of particular religions. In response, Madison stated "that the purpose of his amendment was to recognize restrictions on congressional power. He meant to assure [Congressman] Sylvester and [Congressman] Huntington that *the amendment would not abolish state establishments*, which seems to have been their fear."⁹²

When Jefferson published the Kentucky Resolution in 1798, Madison published the Virginia Resolution. Like Jefferson's resolution, Madison's resolution relied on the principle of federalism to protest the federal Alien and Sedition Acts. Notably, the Virginia Resolution asserted that the federal government had no power to regulate "the liberty of conscience, and of the press," because such powers had not been "delegated by the Constitution, and consequently withheld from the [federal] government." In arguing that the federal government lacked the power to regulate the press, the Virginia Resolution relied on the premise that the federal government obviously lacked any power to interfere with the regulation of religion in the individual states. Madison wrote: "Any construction or argument, then, which would turn the amendment

91. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).

92. *Id.* at 757-79 (emphasis added).

into a grant or acknowledgment of power, with respect to the press, might be equally applied to the freedom of religion.”⁹³

Madison's statements and writings reaffirm the Establishment Clause interpretation by Jefferson. Both men viewed the Establishment Clause as depriving the federal government of jurisdiction over church-state issues, leaving such issues to the state governments.

C. Jefferson's Wall Of Separation

Despite Jefferson's extensive writings on separation of church and state, the United States Supreme Court has focused on a single phrase from a single letter. In his now famous 1802 letter to the Danbury Baptists, Thomas Jefferson wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church and State.”⁹⁴ Based on the letter, the Supreme Court has read the Establishment as mandating a separation between religion and state governments, which the federal courts must enforce. This interpretation is incorrect.

First, it is important to understand Jefferson's audience in this letter. The Danbury Baptists who received Jefferson's letter were largely anti-federalists who, like Jefferson, feared centralized control over religion by the federal government. Professor David Barton explains that the Baptists' anti-federalist views were understandable because “from the early settlement of Rhode Island in the 1630s to the time of the federal Constitution in the 1780s, the Baptists had often found their free exercise suffering from the centralization of power, with their ministers being beaten, imprisoned, and tyrannized.”⁹⁵ Professor Barton explains that the Baptists were so opposed to the centralization of power “that it was the only denomination where a majority of its clergy across the nation voted against the ratification of the Constitution, and the predominately

93. James Madison, *Virginia Resolution*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 577 (Jonathan Elliot 2d ed., 1836).

94. Thomas Jefferson, *Letter to a Committee of the Danbury Baptist Association* (Jan. 1 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (Andrew A. Lipscomb ed., 1904).

95. David Barton, *The Image and the Reality, Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 412 (2003).

Baptist State of Rhode Island overwhelmingly rejected its adoption.”⁹⁶

As noted above,⁹⁷ the anti-federalists feared regulation of religion by the federal government. When he wrote to the Danbury Baptists, the wall that Thomas Jefferson described was simply a wall between the federal government and religion.⁹⁸ Jefferson’s metaphorical wall would have no effect on relationships between state governments and religion. This jurisdictional view of the wall would be entirely consistent with Jefferson’s 1808 letter to Samuel Miller, where Jefferson wrote: “I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.”⁹⁹

The Supreme Court has read Jefferson’s metaphorical wall as mandating federal review of state regulation of religion, with the federal courts striking down improper state interactions with religion. Yet in his letter to Samuel Miller and other documents, Jefferson wrote that the Establishment Clause actually denied the federal government such power—that the federal government was “interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.”¹⁰⁰

Based on the Miller letter and other evidence, Professor Daniel L. Dreisbach rejects the Supreme Court’s reading of Jefferson’s wall of separation, and endorses the jurisdictional view. Dreisbach concludes:

Jefferson’s “wall,” like the First Amendment, affirmed the policy of federalism. This policy emphasized that all government authority over religious matters was allocated to the states . . . Insofar as Jefferson’s “wall,” like the First Amendment, was primarily jurisdictional [or structural] in nature, it offered little in the way of a

96. *Id.*

97. *See supra* text accompanying notes 50–55.

98. *See, e.g.,* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 68 (2002) (“In short, the ‘wall’ Jefferson erected in the Danbury letter was between the federal government on one side and church authorities and state governments on the other.”).

99. Thomas Jefferson, *Letter to the Reverend Samuel Miller* (Jan. 23 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 18, at 428–30.

100. *Id.*

substantive right or universal principle or religious liberty.¹⁰¹

The Supreme Court erred by taking Jefferson's metaphorical wall out of context, and then using this wall as a basis for regulating relationships between state governments and religion. This misuse of Jefferson's work is indeed ironic. Jefferson consistently had sought to preclude such federal "intermeddling" in the relationships between state governments and religion.

D. Jefferson As President: Church and State Policy

As already noted, Jefferson believed that the federal government lacked jurisdiction over religious regulation, with all such powers reserved to the states. Not surprisingly, discussions about church-state relationships rarely arose during Jefferson's two terms as President. However, Jefferson did address at least two significant issues involving religious regulation—the federal practice of Thanksgiving proclamations, and funding of a Catholic Church and priest for the Kaskaskia Indians.

1. Thanksgiving proclamations

Prior to Jefferson's Presidency, the practice of proclaiming a day for Thanksgiving and prayer had dated from the earliest days of George Washington's Presidency. The first Congress urged President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God."¹⁰² President Washington selected November 26, 1789, as a day of thanksgiving to "offer our prayers and supplications to the Great Lord and Ruler of Nations."¹⁰³ John Adams followed Washington's practice of making Thanksgiving proclamations, and designating a day for prayer and religious

101. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 69 (2002).

102. George Washington, *Proclamation for a National Thanksgiving* (Oct. 3 1789), reprinted in 12 *THE WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE* 119–20 (1834).

103. George Washington, *Proclamation. A National Thanksgiving*, in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897* 64 (James D. Richardson ed., 1899).

observance.¹⁰⁴ And after Jefferson's Presidency, James Madison also endorsed Thanksgiving proclamations.¹⁰⁵

As President, Jefferson broke from this practice, and refused to issue Thanksgiving proclamations.¹⁰⁶ Jefferson's refusal to issue Thanksgiving proclamations was certainly idiosyncratic, and contrary to popular practices of the time. Separationists cite this refusal as evidence that Jefferson subscribed to the separation of church and state, and viewed the Thanksgiving proclamations as contrary to this principle.¹⁰⁷

In his 1808 letter to Samuel Miller cited above,¹⁰⁸ Jefferson was responding to Miller's proposal of "a day of fasting & prayer."¹⁰⁹ Jefferson sought to explain his unusual refusal to issue Thanksgiving proclamations. Admittedly, a passage in this letter supports the view of Jefferson as a separationist. Jefferson wrote:

I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies that the general government should be invested with the power of effecting any uniformity of time or matter among them.¹¹⁰

104. John Adams, *Proclamation for a National Fast* (Mar. 6, 1799) (quoting Proverbs 14:34), reprinted in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 172, 173 (1850) (recommending that Thursday, the twenty-fifth day of April next, be observed, throughout the United States of America, as a day of solemn humiliation, fasting, and prayer).

105. James Madison, *A Proclamation*, in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 513 (James D. Richardson ed. 1899) (noting James Madison's July 9, 1812, Proclamation calling for a day of Thanksgiving and prayer).

106. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 623 (1992) (Souter, J., concurring) (noting that President Jefferson refused to issue Thanksgiving proclamations).

107. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting) ("Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause."); *Marsh v. Chambers*, 463 U.S. 783, 807 (1983) (Brennan, J., dissenting) ("Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on Establishment Clause grounds to declare national days of thanksgiving or fasting.").

108. See *supra* text accompanying notes 87.

109. Thomas Jefferson, *Letter to the Reverend Samuel Miller* (Jan. 23 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 18 at 428-30.

110. *Id.*

In this passage, Jefferson writes that with respect to religion, the “civil magistrate” should not “direct its exercises, its discipline, or its doctrines.”¹¹¹ Yet, even in this admittedly separationist passage, Jefferson wrote that it was not in the interest of “religious societies that the *General Government* should be invested with the power of effecting any uniformity of time or matter among them.”¹¹² In recommending a separation between “religion” and the “civil magistrate,” Jefferson’s admonition was directed toward the “General Government”—meaning the federal government—and not state or local governments.

Despite this separationist passage, Jefferson’s decision not to issue religious proclamations emphasized federalism and states’ rights, not separationism. Jefferson explained his refusal to recommend a day of Thanksgiving with the following statement:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the States the powers not delegated to the United States.¹¹³

Jefferson continued: “Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority.”¹¹⁴

This statement indicates that Jefferson refused to issue Thanksgiving proclamations primarily because such an act was beyond the power of the federal government. Jefferson wrote, “the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.”¹¹⁵ On the other hand, Jefferson’s statement indicates that days for Thanksgiving and religious worship could be designated by the individual states. This is because the authority to

111. *Id.*

112. *Id.* (emphasis added).

113. *Id.*

114. *Id.*

115. *Id.*

legislative with respect to religion "must then rest with the States, as far as it can be in any human authority."¹¹⁶

Any argument that Jefferson categorically opposed government-designated days of Thanksgiving fails to consider Jefferson's experience in Virginia. As noted above,¹¹⁷ Jefferson authored Bill No. 85: "A Bill for Appointing Days of Public Fasting and Thanksgiving."¹¹⁸ Under Bill No. 85, the Governor or Chief Magistrate of Virginia could designate days of Thanksgiving and fasting and could notify the public of these days by a proclamation. This bill was introduced by Madison before the Virginia General Assembly, at the same time as Jefferson's Bill for Establishing Religious Freedom.¹¹⁹

Virginia Bill No. 85 seems to conclusively demonstrate that Jefferson did not categorically oppose government-issued days of Thanksgiving. Instead, Jefferson believed that the authority to issue such proclamations rested with the states, and that the federal government was forbidden from "intermeddling" in these matters.

2. *The Kaskaskia Indian Treaty*

In 1803, President Thomas Jefferson proposed a treaty with Kaskaskia Indian Tribe. By this time, the tribe was centered in what would eventually become southern Illinois, along the Mississippi River. The first European settlers in this area were French, with French priests converting many of the Kaskaskia Tribe to catholicism.¹²⁰ When Jefferson proposed the 1803 treaty, the state of Illinois did not yet exist.¹²¹ At this time, the area inhabited by Kaskaskia Tribe was part of the Northwest Territory, administered by the federal government.

Under the treaty proposed by Jefferson, federal funds would be used to build a Catholic church on the tribe's lands, and would provide a salary to support a Catholic priest who would tend to the

116. *Id.*

117. *See supra* text accompanying notes 17–20.

118. REPORT OF THE COMMITTEE OF REVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA in MDCCLXXVI, at 59–60 (Richmond 1784).

119. *See* Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 193 (1990).

120. *See generally* NATALIA MAREE BELTING, *KASKASHIA UNDER THE FRENCH REGIME* (1948).

121. Illinois achieved statehood in 1818.

tribe's spiritual needs. The treaty ultimately ratified by Congress provided:

And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the support of a priest of that religion, who will engage to perform for such tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, to assist the said tribe in the erection of a church.¹²²

The financial assistance offered in the Kaskaskia treaty proposed and approved by Jefferson was entirely inconsistent with any plausible reading of church-state separation. First, federal money was spent for exclusively religious purposes—a priest's salary, and the construction of a church. Furthermore, the aid was not even available to all religious groups. Rather, this was preferential aid available to just one religion—the Catholic Church. Under modern Establishment Clause doctrine, the Supreme Court certainly would strike down this aid.¹²³

On the other hand, the Kaskaskia treaty is entirely consistent with a federalist view of the Establishment Clause. Under such a view, the federal government had no jurisdiction to interfere with state religious regulation. However, Jefferson's Kaskaskia Treaty proposed construction of a church in a federal territory, outside of the borders of any state. The federal government thus had authority to construct the church, because this action by definition could not interfere with any state religious regulation.

Jefferson's actions as President provide little support for contentions that Jefferson advocated a separation of church and state. According to Jefferson, his decision to avoid declaring days of Thanksgiving did not occur because Jefferson's opposed such

122. CHESTER JAMES ANTIEAU, ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT* 167 (1965).

123. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

proclamations, but rather because the federal government lacked the "power to prescribe any religious exercise."¹²⁴ In his 1803 treaty with the Kaskaskia Tribe, Jefferson authorized the use of federal funds to build a church and support a priest. This use of federal funds to support explicitly religious activity was entirely inconsistent with the separation of church and state, but permissible under a federalist approach to the Establishment Clause.

IV. The Supreme Court's Distortion: Jefferson and Establishment Clause

Beginning with *Everson v. Board of Education*,¹²⁵ the Supreme Court has maintained that Jefferson read the Establishment Clause to mandate "a wall of separation between Church and State."¹²⁶ For the Justices, this meant that the federal Supreme Court must police state regulation of religion, to insure that state actions did not breach the mythical wall.

The Court's "wall of separation" interpretation in *Everson* is the exact opposite of everything Jefferson stood for. As this paper has established, Jefferson sought to limit the authority of the federal government with respect to domestic regulation, including religion. The *Everson* Court largely ignored this evidence, either intentionally, or as the result of sloppy history. As a result, the Court has cited Jefferson as authorizing the federal government to police church-state relationships, when Jefferson sought to place such relationships beyond the authority of the federal government.

Despite the inaccurate historical record in *Everson*, no Justice seriously revisited the original understanding of the Establishment Clause for years. Nonetheless, the Justices have demonstrated a certain ambiguity about the vitality of the so-called wall of separation. When the Court strikes down a state law, the Justices often invoke the wall of separation. Yet in other opinions, the Court has described the wall the separation as blurry, indistinct, and largely unimportant in analysis.

In recent years, opinions by Justice Rehnquist and Justice Thomas have made the first attempts to reevaluate the historical foundations of the "wall of separation" metaphor. Despite at least

124. Letter from Thomas Jefferson to the Reverend Samuel Miller, *supra* note 18 at 428-30.

125. *Everson*, 330 U.S. 1.

126. *Id.* at 16.

some willingness to review the Court's Establishment Clause history, one must wonder whether the Court will reevaluate many of its questionable originalist premises. Over the years, the Court has built a considerable body of Establishment Clause law on the shaky foundation of Jefferson's mythical wall of separation.

A. *Everson v. Board of Education*

In *Everson v. Board of Education*,¹²⁷ the Supreme Court developed the foundation of modern Establishment Clause doctrine, including the emphasis on a "separation of church and state." The opinion attempts to invoke historical analysis, with an emphasis on the purported views of Jefferson and Madison. In particular, the opinion argues that Jefferson read the Establishment Clause as endorsing a separationist policy. Oddly, this portrait of Jefferson was drawn almost entirely from Jefferson's writings about religious assessments in Virginia. Meanwhile, the Court entirely ignored Jefferson's broader writings about federalism, and his federalist writings about the Establishment Clause. The Justices either were unaware of these writings, or omitted these materials in order to intentionally distort Jefferson's views on the Establishment Clause.

Everson dealt with a New Jersey statute, which required local school boards to reimburse private school students for the cost of bus transportation to school.¹²⁸ Justice Black's majority opinion claimed to review the history of the Establishment Clause. However, the history recounted was not that of the Establishment Clause itself, but rather of the successful battle to end religious assessments in the State of Virginia. This was a serious error.

According to the *Everson* majority, the dispute about the proper relationship between church and state "reached its dramatic climax in Virginia in 1785-86, when the legislative body was about to renew Virginia's tax levy for the support of the established church."¹²⁹ The Court noted that Jefferson and Madison "led the fight against this tax."¹³⁰ The *Everson* majority further noted Madison's *Memorial and Remonstrance Against Religious Assessments*, where Madison purportedly argued "that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a

127. *Id.*

128. *Id.* at 3 n.1.

129. *Id.* at 11-12.

130. *Id.* at 12.

society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.”¹³¹

The Court continued that the Virginia legislature not only declined to renew the tax levy, but also enacted Jefferson’s Bill for Religious Liberty.¹³² The *Everson* Court then quoted Jefferson’s bill: “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”¹³³

Although the *Everson* Court focused on events in Virginia, the Justices were interpreting the federal Establishment Clause, not the Virginia Bill for Religious Liberty. Nonetheless, Justice Black asserted: “This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”¹³⁴

By focusing exclusively on Virginia, Justice Black completely ignored—either intentionally or inadvertently—Jefferson’s writing on the *federal* Establishment Clause. For example, the *Everson* majority did not mention the Kentucky Resolutions, in which Jefferson wrote that the federal government had “no power over the freedom of religion, freedom of speech, or freedom of the press.”¹³⁵ Nor did the *Everson* majority mention Jefferson’s letter to Samuel Miller, where Jefferson wrote that the power regulate religion must “then rest with the States, as far as it can be in any human authority.”¹³⁶

Even with respect to Jefferson’s acts in Virginia, the *Everson* Court’s historical record was highly selective. The Court accurately noted Jefferson’s opposition to the state’s religious assessments. But the Court failed to acknowledge that at the same time, Jefferson also introduced a bill to punish individuals who disturbed religious worship, and another bill to establish religious Thanksgiving

131. *Id.*

132. *Id.*

133. *Id.* at 12–13.

134. *Id.* at 13.

135. 5 THE FOUNDERS’ CONSTITUTION, *supra* note 2.

136. Letter from Thomas Jefferson to the Reverend Samuel Miller, *supra* note 18, at 428–30.

holidays.¹³⁷ No one knows why Justice Black's majority opinion omitted these other bills, which were introduced at the same time as the Bill for Establishing Religious Liberty. Perhaps Justice Black simply was unaware of these additional bills. Or maybe the bills did not support Justice Black's predetermined conclusion.

Whatever the reason for Justice Black's highly selective discussion of historical documents, the result is a badly compromised historical account. Robert Cord writes that after reading the *Everson* decision, "one might come to the conclusion that Madison and Jefferson fought the battle for religious freedom in Virginia, wrote a few letters on the subject, and then retired."¹³⁸

Given these wholesale omissions, it is not surprising that Justice Black's discussion of Establishment Clause history contains misstatements. Consider Justice Black's concluding statement about the history of the Establishment Clause: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."¹³⁹ Justice Black continued: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'¹⁴⁰

This article demonstrates that Justice Black's historical account of the Establishment Clause is incorrect. Consider Justice Black's statement that neither a state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another."¹⁴¹ This article noted that President Washington, President Adams, and President Madison all made Thanksgiving Proclamations—clearly a practice that aided religion.¹⁴² Jefferson's 1803 treaty with the Kaskaskia Tribe authorized the use of federal funds to build a church and support a priest. That was a law that aided "one religion"—the Catholic Church—and thus seemed to

137. See *supra* text accompanying notes 9–17.

138. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 120 (1988).

139. *Everson*, 330 U.S. at 15–16.

140. *Id.* at 16.

141. *Id.* at 15–16.

142. See *supra* text accompanying notes 102–105.

“prefer one religion over another.” Justice Black simply ignored these examples.

But while Justice Black’s *Everson* opinion may get poor marks as a historical document, the opinion was successful in another sense. In *Everson*, Justice Black and his colleagues announced for the first time that the Supreme Court had the authority to review state government regulation of religious organizations—something the framers of the First Amendment had sought to avoid. In the years following *Everson*, the Court has not been shy about exercising this new power. Among other things, federal courts have cited the Establishment Clause as a means of regulating private school funding,¹⁴³ public school curriculum and events,¹⁴⁴ and religious symbols.¹⁴⁵

B. Jefferson’s “Wall of Separation” After *Everson*

One would expect that subsequent Supreme Court opinions would return to Thomas Jefferson and the original understanding of the Establishment Clause—either to shore up Justice Black’s assertions, or to debunk them. But for more than 35 years, no one on the Court seriously questioned Justice Black’s historical account. At the same time, the Justices did not forget the “wall of separation” metaphor. Instead, when a Court majority decided to strike down a state law or practice, the Justices would refer back to the “wall of separation”—typically with little elaboration or explanation.

In *McCullum v. Board of Education*,¹⁴⁶ the Justices struck down a “released time” program, where students were let out of school early either to attend on-campus classes on religious instruction, or to attend a study hall.¹⁴⁷ The *McCullum* majority wrote: “The operation of the state’s compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects . . . This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”¹⁴⁸ In concluding that the

143. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down a state statute that authorized salary supplements for private school teachers).

144. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (a law mandating that public schools cannot teach evolution violated the Establishment Clause).

145. See, e.g., *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (a Ten Commandments display in a courthouse violated the Establishment Clause).

146. *McCullum*, 333 U.S. 203.

147. *Id.* at 208–09.

148. *Id.* at 209–10.

Illinois program violated the Establishment Clause, the *McCollum* majority concluded that both the “majority in the *Everson* case, and the minority . . . agreed that the First Amendment’s language, properly interpreted, had erected a wall of separation between Church and State.”¹⁴⁹

Jefferson’s “wall of separation” was cited again in *Larkin v. Grendel’s Den*.¹⁵⁰ In *Larkin*, a Massachusetts law allowed churches and schools to veto any liquor license sought by an establishment located within 500 feet of the church or school.¹⁵¹ In holding that this grant of veto power to churches violated the Establishment Clause, the *Larkin* Court described the “concept of a ‘wall’ of separation as a useful signpost.”¹⁵² The *Larkin* majority continued: “Here that ‘wall’ is substantially breached by vesting discretionary governmental powers in religious bodies.”¹⁵³

In *Lee v. Weisman*,¹⁵⁴ the Court again turned to the famous “wall of separation” metaphor. *Lee* held that a prayer at a public high school graduation ceremony violated the Establishment Clause.¹⁵⁵ Quoting from *Everson*, the *Lee* Court asserted: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.”¹⁵⁶

Despite these regular invocations of Jefferson’s supposed “wall of separation,” the Court’s decisions have sometimes downplayed the importance of the *Everson* metaphor. In *Lemon v. Kurtzman*,¹⁵⁷ the Court struck down two programs that provided direct state payments and teacher salary supplements to private schools—including private religious schools.¹⁵⁸ Despite concluding that these school aid programs violated the Establishment Clause, the majority asserted that “the line of separation, far from being a wall is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”¹⁵⁹

149. *Id.* at 211.

150. *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982).

151. *Id.* at 117.

152. *Id.* at 123.

153. *Id.*

154. *Lee*, 505 U.S. 577.

155. *Id.* at 581–82.

156. *Id.* at 600 (quoting *Everson*, 330 U.S. 1, 16).

157. *Lemon*, 403 U.S. 602.

158. *Id.* at 606–11.

159. *Id.* at 615.

In *Lynch v. Donnelly*,¹⁶⁰ the Court held that the city of Pawtucket, Rhode Island could maintain a Christmas nativity scene. The *Donnelly* Court described the wall of separation metaphor as “not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”¹⁶¹

Since *Everson*, Supreme Court decisions often have invoked Jefferson’s supposed principle of “separation of church and state,” often prior to invalidating a state law or practice. Such invocations typically have been brief, with little analysis of the underlying historical validity of the church-state separation metaphor. And some decisions even have questioned the extent to which the “wall of separation” metaphor aids in Establishment Clause analysis.

C. Reconsidering Establishment Clause History

Two Establishment Clause opinions—one by Justice William Rehnquist and one by Justice Clarence Thomas—have revisited the original understanding of the Establishment Clause. Neither of these opinions focuses on the views of Thomas Jefferson. Yet each opinion comes closer to Jefferson’s understanding of the Establishment Clause than the poorly researched and conclusory *Everson* opinion. These opinions at least suggest a possibility that the Supreme Court may one day reevaluate the Justices’s interpretation of Jefferson’s views.

In *Wallace v. Jaffree*,¹⁶² the Supreme Court struck down an Alabama statute that established a one-minute moment of silence in the public schools.¹⁶³ The Wallace majority concluded that the law lacked a secular purpose, because the state had enacted this legislation “for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each schoolday.”¹⁶⁴

In his dissenting opinion, Justice William Rehnquist engaged in an extended review of the original understanding of the Establishment Clause. Rehnquist focused primarily on the actual legislative history of the Establishment Clause. Rehnquist thus corrected one of the major flaws in *Everson*, where Justice Black inexplicably attempted to divine the meaning of the Establishment

160. *Lynch v. Donnelly*, 465 U.S. 688.

161. *Id.* at 673.

162. *Wallace v. Jaffree*, 472 U.S. 38.

163. *Id.* at 40–41.

164. *Id.* at 60.

Clause by focusing on Jefferson's Virginia Bill For Establishing Religious Freedom. And while Rehnquist focused primarily on Establishment Clause legislative history, he did note some important framing-era federal actions—such as the presidential Thanksgiving proclamations, and Jefferson's funding of a Catholic priest and church in his treaty with the Kaskaskia Indian Tribe.¹⁶⁵

In an analysis very different from *Everson*, Justice Rehnquist viewed Jefferson as something of a bystander with respect to the Establishment Clause. Justice Rehnquist wrote: "Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States."¹⁶⁶ Rehnquist continued that Jefferson "would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment."¹⁶⁷

Justice Rehnquist carefully reviewed the legislative history of the Establishment Clause, with a particular focus on the work of James Madison. Ultimately, Justice Rehnquist came to a conclusion very similar to that discussed in this article—that the Establishment Clause was designed primarily to prevent the federal government from interfering with state religious regulation. As Justice Rehnquist put it, the Establishment Clause originally "forbade establishment of a national religion, and forbade preference among religious sects or denominations."¹⁶⁸ Justice Rehnquist continued: "The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."¹⁶⁹

Justice Clarence Thomas endorsed a similar federalism interpretation in *Elk Grove Unified School District v. Newdow*.¹⁷⁰ Michael Newdow filed suit, alleging that when a public school required his daughter to say the words "under God" in the pledge of allegiance, the State of California violated the Establishment

165. See *id.* at 103–04.

166. *Id.* at 92.

167. *Id.*

168. *Id.* at 106.

169. *Id.*

170. 542 U.S. 1 (2004).

Clause.¹⁷¹ Sandra Banning, the girl's mother, established that she had exclusive legal custody over the girl.¹⁷² Because Newdow did not have custody over his daughter, the Supreme Court dismissed the case for lack of standing.¹⁷³

Justice Thomas filed a separate opinion, concurring in the judgment. In a relatively brief opinion, Justice Thomas endorsed a federalist interpretation of the Establishment Clause that is consistent with the Thomas Jefferson's writings. Justice Thomas wrote: "As a textual matter, this [Establishment] Clause probably prohibits Congress from establishing a national religion."¹⁷⁴ Beyond that, "the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right."¹⁷⁵

Justice Rehnquist and Justice Thomas deserve credit for their willingness to revisit the well-established, but fundamentally flawed historical analysis in *Everson*. With that said, the Court has based a considerable body of doctrine on the inaccurate "wall of separation" metaphor from *Everson*. As noted above, this inaccurate history has empowered the Justices to review state legislation and policies that otherwise would be outside of the Court's jurisdiction. An occasional complaint about history may not be sufficient for the Court to willingly give up this power.

Conclusion

According to mainstream legal analysis, Thomas Jefferson read the Establishment Clause as mandating a wall of separation between church and state. The Supreme Court has used this purported Jeffersonian interpretation as a basis for federal intervention into state religious regulation.

The mainstream interpretation of Thomas Jefferson's understanding of the Establishment Clause is not supported by the historical record. A belief in state's rights and limited federal government were Jefferson's most important tenets. These themes were emphasized by the anti-federalists during the debates on ratification of the Constitution. Jefferson joined the anti-federalist

171. *Id.* at 8.

172. *Id.* at 9. Banning and Newdow never were married.

173. *Id.* at 17–18.

174. *Id.* at 50.

175. *Id.*

call for a Bill of Rights, which the anti-federalists favored as a means of limiting federal power. After joining President Washington's administration as Secretary of State, Jefferson again emphasized his limited view of federal power when he opposed the creation of a Bank of the United States.

Jefferson's writings on church and state also were concerned with limiting federal power, as opposed to emphasizing a particular form of church-state relations. Jefferson stated this jurisdictional view of the Establishment Clause in the Kentucky Resolutions, when he wrote that the federal government had "no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . All lawful powers respecting the same did of right remain, and were reserved to the states, or to the people."¹⁷⁶

For Jefferson, as for the other framers, church-state relationships were to be determined by state and local governments, resulting in a likelihood of significant regional differences. As these sources indicate, Jefferson's famous call for a wall of separation between church and state did not mean that all government must avoid aiding or interacting with religion. Instead, Jefferson's metaphorical wall was intended to keep the federal government out of the business of religious regulation. The wall of separation amounted to an admonition to the federal government, rather than a prescription for the proper relationship between religion and the state governments.

When viewed in this context, the mainstream interpretation of Jefferson's views on the Establishment Clause amounts to the polar opposite of Jefferson's actual views. The United States Supreme Court has cited Jefferson as authority for intervening on issues such as the place of religion in school curriculum, invocations of religion in the public schools, and government funding of private religious schools. Yet Jefferson believed that such issues should be resolved by state and local governments, as opposed to heavy-handed, top-down federal mandates. The Court's rulings on such issues are precisely the sort of federal intervention that Jefferson sought to proscribe.

Like Jefferson himself, this article does not reach a normative conclusion about the wisdom of church-state separation. A separationist interpretation of the Establishment Clause is one possible option.

176. 5 THE FOUNDERS' CONSTITUTION, *supra* note 2.

But the Supreme Court's claims that Jefferson himself advocated a federally mandated separation of church and state are simply wrong. The Court's misuse of Jefferson's writings has been either ill-informed and inaccurate, or an intentionally misleading creation intended to support the Court's extension of its own power and authority.